Supreme Court, U.S.
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No. 95-30

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD L. FISHELL and DOROTHY M. FISHELL,
Petitioners,

v.

ROBERT SOLTOW and ROSALEE SOLTOW,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

GARY C. ROGERS
FRASER TREBILCOCK DAVIS & FOSTER, P.C
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: 517/482-5800
Counsel for Respondents

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QUESTIONS PRESENTED

1. Whether the District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit erred when they held that the Debtors (Petitioners) did not have standing to appeal the settlement of an adversary proceeding where Debtors (Petitioners) were not parties to the Settlement Agreement and where they failed to establish that they were "persons aggrieved" by the Bankruptcy Court's Order approving the settlement.

2. Whether the Bankruptcy Court's exercise of its discretion in approving the settlement of an adversary proceeding pursuant to 11 U.S.C. §9019(a) after first familiarizing itself with the facts and the legal theories of the parties creates a conflict of authority within the Circuit Court of Appeals.

3. Whether the Bankruptcy Court's approval of the settlement of a fact specific adversary proceeding, important only to the parties involved, and so lacking in legal significance that neither the District Court nor the Court of Appeals issued published opinions is the type of case warranting review by the United States Supreme Court.

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STATUTORY PROVISIONS INVOLVED

Fed. R. Bank. P. 9019(a) provides:

> "(a) *Compromise*. On motion by the Trustee and after a hearing on notice of creditors, the United States Trustee, the Debtor and indenture Trustees as provided in Rule 2002 and to such other entities as the Court may designate, the Court may approve a compromise or settlement.

STATEMENT OF THE CASE

Respondents, Robert and Rosalee Soltow ("Soltows"), respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Sixth Circuit's Opinion below. That Opinion, like the District Court's Opinion, is unpublished but both are reprinted in the Addendum to the Petition for Writ of Certiorari at A-1 and A-21.

Soltows[1] generally concur with the Statement of the Case as set forth in Petitioners' brief. However, the Fact Summary included in Petitioners' brief includes a somewhat misleading chronology, pertinent omissions as well as inaccurate statements which Soltows will point out in this section.[2]

The instant Petition for Writ of Certiorari taken by Petitioners represents the latest chapter in this protracted litigation fraught with continuous delaying tactics on the part of the Petitioners. These delaying tactics, including the filing of bankruptcy itself, has had the effect of stopping the sale of the real property which was the subject of the adversary proceeding by the current owners (Soltows) for over six (6) years.

This matter arises out of the Bankruptcy Court for the Western District of Michigan's approval of the Chapter 7 Trustee's Motion to Approve Settlement of an Adversary Proceeding following a hearing held on July 10, 1992. [A102-A168.] The settlement of the adversary proceeding resulted in

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[1]Respondent Robert Soltow died in June of 1995. His wife, Respondent Rosalee Soltow, has been appointed personal representative of his estate.

[2]Throughout the remainder of this Brief, Respondents will be referred to by their names, i.e., Robert and Rosalee Soltow "Soltows" or "Respondents" and the Chapter 7 Trustee, John Porter, as "Trustee". Petitioners will be referred to as either the "Debtors", "Petitioners", or "Fishells".

the dismissal of the Estate's complaint against Robert and Rosalee Soltow which had previously been brought by Debtors Richard L. and Dorothy M. Fishell wherein Mr. Fishell alleged inter alia that he held an equitable mortgage on the property because he "didn't understand" the deed he gave to Robert Soltow in 1988 in lieu of foreclosure on a 44-acre parcel of property located in Eaton County, Michigan (the "Subject Property"). In exchange for dismissal of the lawsuit against the Soltows, the Estate received in consideration from Robert Soltow, a payment in the sum of $2,000 to the Estate and the release of Mr. Soltow's counterclaim against the Estate valued by Mr. Soltow at over $250,000, wherein he alleged slander of title as a result of the Debtors' wrongful filing of a Lis Pendens on the Subject Property. It was contended by Soltows that the wrongful filing of the Lis Pendens prevented conveyance of the Subject Property during the pendency of the litigation.

Debtors initially filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Western District of Michigan on November 16, 1990. Their case was converted to Chapter 7 on January 13, 1992 following a hearing on the U. S. Trustee's and Creditors Soltows' and Fraser Trebilcock Davis & Foster, P.C.'s Motion to Convert. Creditor Patricia Andre also filed a joinder motion seeking conversion. Debtors subsequently sought reconsideration of the conversion but the reconsideration motion was denied on January 31, 1992. An appeal of the conversion was taken by Fishells to the U.S. District Court for the Western District of Michigan which on November 24, 1992 affirmed the Bankruptcy Court's Order of Conversion to Chapter 7. Debtors subsequently appealed the U.S. District Court's affirmance of the conversion to the United States Court of Appeals for the Sixth Circuit which

affirmed the District Court and the Bankruptcy Court on March 1, 1994 in an unpublished decision.[3]

Following conversion to Chapter 7, the Bankruptcy Court appointed Respondent John Porter as the Chapter 7 Trustee to effectuate and administer the liquidation of the Chapter 7 bankruptcy estate. As part of fulfilling that function the Trustee was required to evaluate the adversary proceeding filed by the Debtors against the Soltows and determine whether the lawsuit was an asset of value of the Estate. The adversary proceeding was originally a state court proceeding filed by the Debtors against Soltows in 1989 concerning the Subject Property but which had been removed by the Debtors to the Bankruptcy Court shortly after the filing of the Chapter 11 proceeding.

The adversary proceeding brought by the Debtors against Soltows, sought to avoid a deed in lieu of foreclosure given to Robert Soltow through which the Debtors conveyed the Subject Property. The lawsuit had been in litigation for three years prior to the Bankruptcy Court's approval of the settlement. However, much of the litigation took place while the case was pending before the Bankruptcy Court. This included cross motions for summary judgment and lengthy supporting briefs, depositions and an extensive pretrial conducted by the Bankruptcy Court.

The Underlying Transaction

The adversary proceeding arises from a 1986 loan/mortgage agreement entered into between Robert Soltow and Fishells. In 1986, Soltows' neighbor, Richard Fishell, approached Robert Soltow and asked him to become financially involved in a real estate deal. Mr. Soltow declined, but was willing to lend money to Mr. Fishell so long as the loan could be structured for Mr. Soltow's protection and his legal counsel, the Fraser Trebilcock Davis & Foster, P.C. law firm, handled

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[3]United States Court of Appeals, Sixth Circuit, Case No. 93-1182.

the details of the loan arrangements. Fishells wanted the money to purchase the Subject Property. On July 8, 1986, the Fishells and Mr. Soltow entered into a promissory note and a mortgage. Mr. Soltow initially loaned the Fishells $350,000 at 15 percent interest, with semi-annual payments due beginning January 7, 1987 and the entire principal and accrued interest being due July 7, 1989. The obligation was secured by the Subject Property through the mortgage. The Fishells never paid Mr. Soltow back even a penny of the loan as the note required. In early 1988, the Fishells were notified that the loan was in default and that foreclosure proceedings would be commenced if the loan was not paid in full. Richard Fishell has admitted that he understood that Soltow was entitled to his money and entitled to foreclosure on the Subject Property.

Mr. Fishell was interested in working out something in lieu of foreclosure because he wanted to avoid publication of the foreclosure notice in the local newspaper and because he believed that he would be able to sell the Subject Property and avoid further default proceedings. Soltow had also loaned Fishells other amounts during this time period to provide for improvements on the Subject Property or to assist with Fishells' living expenses. On August 25, 1988, Fishells and Mr. Soltow entered into an Amended Promissory Note, a Mortgage Modification Agreement and an Escrow Holding Agreement. The note which Plaintiffs executed on August 25, 1988 was for a principal amount of $610,446.14, representing not only the 1986 loan, but also additional monies which Mr. Soltow had loaned to the Fishells in previous years. The Escrow Holding Agreement provided that Mr. Soltow would not commence foreclosure immediately, but instead would provide the Fishells until February 15, 1989 in which to make full payment. It further required Mr. Soltow to place a mortgage discharge into escrow and conversely, Fishells were required to place an executed warranty deed to the Subject Property in escrow. If Fishells' indebtedness was not paid by February 15, 1989, the escrow agent, Lawyers Title Insurance

Corporation ("Lawyers Title"), was required to, upon notice, release to Mr. Soltow the warranty deed conveying the Subject Property to him. Conversely, if the Fishells paid off the indebtedness, Lawyers Title was to release to the Fishells the mortgage discharge. Mr. Fishell has admitted that he understood the documents he executed on August 25, 1988 in testimony given before the state court and at the 2004 hearing held by the Bankruptcy Court while the Trustee was investigating the merit or lack of merit of the adversary proceeding.

The Fishells never paid anything to Mr. Soltow even though an extension was given. Mr. Soltow then notified the escrow agent pursuant to the terms of the Escrow Holding Agreement, the escrow agent delivered the warranty deed to Mr. Soltow. The warranty deed was recorded on March 16, 1989 in the Eaton County Register of Deeds.

On April 27, 1989, the Fishells, proceeding initially in pro per, filed a complaint in the state court seeking to cancel the warranty deed. They also filed a Notice of Lis Pendens to the Subject Property. The complaint contended that, inter alia when Mr. Fishell signed the 1988 documents, he did not understand the nature of the documents. On June 12, 1989, Soltows filed a counterclaim alleging the Lis Pendens had slandered the title to his property. It was contended by Soltows in their counterclaim that should the litigation continue, and should they prevail, Soltows would pursue their slander of title action against the Debtors.

Chapter 11

The state court proceeding was removed to the United States Bankruptcy Court for the Western District of Michigan. The adversary proceeding was assigned in early 1991 to the Honorable David E. Nims, Jr. The docket from the Bankruptcy Court, which was available to both the District Court and the Sixth Circuit, shows that over the initial 14 months that the Chapter 11 bankruptcy was pending, many motions and related proceedings were brought and considered by Judge Nims who

became extremely familiar with the bankruptcy case, the adversary proceeding and with the credibility of the Fishells.

Bankruptcy Judge Nims became especially familiar with the subject adversary proceeding having denied lengthy cross-motions for summary judgment which had been filed by Fishells and Soltows (reasoning that since appeal was inevitable, it would be prudent to make a full factual record prior to deciding the case, lest he later be reversed for failing to do so). The Court also conducted a lengthy and detailed pretrial of the matter. The trial of the matter was repeatedly scheduled and adjourned, invariably at Fishells' request.

Following conversion of the Chapter 11 proceeding to Chapter 7, the Chapter 7 Trustee, after determining the enormity of the litigation following meetings with the parties, retained the services of attorney Harold Nelson to analyze and evaluate the Debtors' claim against the Soltows. On May 29, 1992, Mr. Nelson conducted a formal 2004 examination of Debtor Richard L. Fishell making substantial inquiry into the merit or lack of merit of Fishells' claim made in the adversary proceeding. After review of the many pleadings and motions filed in the adversary proceeding, the documentation accompanying those pleadings and motions, and after conducting independent research of the legal issues, Mr. Nelson and the Trustee successfully negotiated a settlement with Soltows whereby Soltows would pay the Estate $2,000, and Mr. Soltow would withdraw his Proof of Claim based on the slander of title to the Subject Property in exchange for dismissal of the adversarial proceeding with prejudice. The withdrawal of Soltows' Proof of Claim eliminated the single largest claim against the estate which if allowed, would have had the potential effect of Soltows obtaining a judgment eclipsing the available assets of the estate resulting in the Trustee having nothing to distribute to creditors other than Soltows.

On July 10, 1992, a hearing was held on the Trustee's Motion to Approve Settlement at which time the Honorable

David E. Nims, Jr., after hearing argument of counsel, and offering to take proofs from the objecting Debtors who presented none, approved the settlement, finding the settlement to be in the best interest of the Estate. Thereafter, Debtors' counsel filed a motion for reconsideration. On August 21, 1992, Judge Nims held a hearing and denied the motion for reconsideration via Order dated August 25, 1992. An Order sanctioning the Debtors' attorney for failure to raise any new issues was also issued at that hearing. An appeal, by Debtors, was then taken to the U.S. District Court which on December 7, 1993 affirmed the Bankruptcy Court's Order regarding settlement. A subsequent Order entered by the U.S. District Court on December 9, 1993 also confirmed the bankruptcy judge's decision to sanction Debtors' attorney.

Both the U.S. District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals held, in unpublished opinions, that Debtors lacked standing to appeal and that even if the Debtors did have standing, the Bankruptcy Court did not abuse its discretion in approving the settlement as the Bankruptcy Court had adequately apprised itself of the action's underlying facts and made an independent, informed judgment as to whether the settlement was fair and equitable.

REASONS TO DENY THE WRIT

I. THE DEBTORS LACK STANDING TO APPEAL.

Petitioners argue that there have been two reversible errors by the lower courts. First, Petitioners argue that the Bankruptcy Court failed to make an adequate record of its reasons for approving the settlement thereby suggesting that the Bankruptcy Court lacked the necessary quantum of information necessary to make an informed decision on the merits of the lawsuit, the settlement and the fact that it was in the best interest of the creditors. Petitioners second claim of error is that the lower courts were wrong in concluding that given the

facts of this case, the Debtors lacked standing to appeal the decision of the Bankruptcy Court approving the settlement. Both of Petitioners' claims of error are without merit.

The factors a Bankruptcy Court looks to in determining whether a settlement should or should not be approved are contained in numerous opinions having their roots in the case of Protective Committee Stockholders of TMT Trailer Ferry, Inc v Anderson, 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968). In TMT, this Court stated that in reviewing proposed settlements, a Bankruptcy Court should:

> . . . apprise itself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties in collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Id. at 424.

Most circuits have adopted a set of uniform factors the bankruptcy judge should consider in the process of reviewing proposed settlements. These four factors include:

(a) The probability of success in the litigation;
(b) the difficulties, if any, to be encountered in the matter of collection;
(c) the complexity of the litigation involved and the expense, inconvenience

and delay necessarily attending it;

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Continental Investment Corp, 637 F2d 8 (1st Cir. 1980); In re Jackson Brewing Co, 624 F2d 605, 607 (5th Cir. 1980); In re Flight Transportation Corp Securities Litigation, 730 F2d 1128 (8th Cir. 1984), cert. denied, 469 U.S. 1207; 105 S. Ct. 1169; 84 L. Ed. 2d 320 (1985); In re A & C Properties, 784 F2d 1377, 1380 (9th Cir. 1986), cert. den. 479 U.S. 854, 107 S.Ct. 189, 93 L. Ed. 2d 122 (1986).

A. The Issue Of Standing Is Reviewed Under The Abuse Of Discretion Standard.

An appellate court reviews questions of law on a de novo basis. In re Revco D.S., Inc, 898 F2d 498, 499 (6th Cir. 1990). However, issues of fact are reviewed based on abuse of discretion In re American Reserve Corp, 841 F2d 159, 162 (7th Cir. 1987). Whether an appellant is a "person aggrieved" is generally considered a question of fact for the trial court. In re El San Juan Hotel, 809 F2d 151, 155 n 3 (1st Cir. 1987).

B. The Debtors Are Not Persons Aggrieved By The Bankruptcy Court Order Approving The Settlement.

The District Court and the Sixth Circuit reviewed the facts of this case and legal arguments presented and held that the Debtors lacked standing to appeal the Settlement Agreement because the Debtors did not show that they were persons

aggrieved by the Bankruptcy Court's Order. These decisions should be allowed to stand as they are correct.

The parties in interest to the adversary proceeding on appeal are John A. Porter, Trustee of the Estate of Richard and Dorothy Fishell, and Robert and Rosalee Soltow, not the Debtors. The Trustee acceded to the Debtors' interest when the case was converted from Chapter 11 to Chapter 7. At that point in time, the Trustee "stepped into the shoes" of the Debtors and assumed the responsibility of determining what was in the best interest of the unsecured creditors and the Estate. The proper parties to the Settlement Agreement were the Bankruptcy Trustee and the Soltows. Bauer v Commerce Union Bank, 859 F2d 438, 441 (6th Cir. 1988), cert. denied, 489 U.S. 1079; 109 S. Ct. 1531; 103 L. Ed. 2d 836 (1989); In re Thompson, 965 F2d 1136, 1141 (1st Cir. 1992).

Other Courts have held that nonparty participation in an adversary proceeding is dependent on intervention. See In re Latimer, 918 F2d 136, 137 (10th Cir. 1990), cert. denied, 502 U.S. 863, 112 S. Ct. 186, 116 L. Ed. 2d 147 (1991) (debtor lacks standing to participate in an adversary proceeding, absent intervention). Mere participation in a hearing on the approval of a settlement or compromise in an adversary proceeding does not constitute *de facto* intervention. Thompson at 1141-1142. A nonparty lacks appellate standing in bankruptcy proceedings unless the nonparty can qualify as a "person aggrieved" by the challenged order. See In re Revco D.S., Inc, 898 F2d 498, 499 (6th Cir. 1990); In re El San Juan Hotel, 809 F2d 151, 154 (1st Cir. 1987). "Persons aggrieved" are "persons with a financial stake in the bankruptcy court's order," Revco at 499; or "those persons whose rights or interests are `directly and adversely affected pecuniarily' by the order or decree . . ." El San Juan Hotel at 154. A Chapter 7 debtor generally is not considered a "person aggrieved," as the debtors lack a pecuniary interest in the "property of the estate." Id. at 154-55; In re MCI, Inc, 151 B.R. 103, 106 (E.D. Mich. 1992).

Petitioners argue that they are directly and adversely affected pecuniarily by the challenged Order based on their "pie in the sky" claimed value of the Subject Property exceeding the liabilities of the Estate.

In bankruptcy proceedings, values are referred to at different points in time for different purposes. In fact, 11 U.S.C. § 506 of the Code and the commentary dealing with valuation recognize that different values may be derived during the course of the proceedings for different purposes, and are not binding on the debtor or creditor for future valuation purposes. The debtor claims that an "independent" appraisal commissioned around 1986 by a prospective purchaser set the value of the Subject Property at over one million dollars. Though not part of the record on appeal, more recent appraisals commissioned by Soltows refute that claim.

It is well recognized that the value of estate property as a going concern in any particular year is significantly greater than its liquidation value. Even if it were to be believed that the valuation Petitioners put on the Subject Property are actually between $500,000 and $1.35 million. That value reflects what the Debtors hoped to get under the best possible conditions in a good real estate market from a willing buyer who had the same vision for development that Petitioners had. Facing a liquidation sale in the 1992 Eaton County, Michigan real estate market, when the adversary proceeding was settled, is an entirely different story. The Courts below and the Trustee recognized these factors. More significantly, even if the Petitioners' estimate of the value of the Subject Property was correct, Petitioners never demonstrated any likelihood of success on the merits of the adversary proceeding. Without establishing a likelihood of success, the alleged value of the Subject Property is irrelevant.

In their attempt to discredit Soltows' slander of title counterclaim, Petitioners have asserted that the claim has no legal validity or is of speculative value. However, others who have reviewed this claim and the facts supporting it disagree.

Both the Bankruptcy Judge and the Trustee thought there was merit to Soltows' claim. As is clearly set forth in Patten Corp v Canadian Lakes Dev Corp, 788 F. Supp. 975, 978 (W.D. Mich. 1991), under Michigan law, an improper filing of notice of lis pendens can be the basis for a slander of title claim.

Other than making bold assertions, completely unsupported by fact, the Petitioners never made any showing that successful litigation in the adversary proceeding would have resulted in any surplus of assets to the Estate which would eventually have been disbursed to the Petitioners. Petitioners never presented a willing buyer who agreed to pay a price so substantial that all creditors would be paid in full and that surplus money would exist that would go to the Petitioners. This is because no such buyer has ever existed. Fishells' claims of there being a "surplus" after all creditors were paid in full is merely unsupported speculation. Without such a showing, the Courts below were correct in holding that the Petitioners lacked standing to pursue an appeal of the settlement of the adversary proceeding. See Thompson, supra at 1144, n.12

II. THE SIXTH CIRCUIT DID NOT ERR WHEN IT HELD THAT THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY APPROVING THE SETTLEMENT OF THE ADVERSARY PROCEEDING AND ITS DECISION IS IN HARMONY WITH OTHER CIRCUITS AS WELL AS THIS COURT'S DECISION IN TMT TRAILER.

A. The Sixth Circuit Properly Affirmed The Bankruptcy Court Which Has Broad Discretion To Approve Settlements.

It is well established that a bankruptcy court's decision to approve a settlement is only reviewable for abuse of discretion.

In re Teltronics Services, Inc, 762 F2d 185 (2d Cir. 1985); In re Emerald Oil Co, 807 F2d 1234, 1239 (5th Cir. 1987); In re American Reserve Corp, 841 F2d 159, 162 (7th Cir. 1987); In re A & C Properties, 784 F2d 1377 (9th Cir. 1986), cert. denied, 479 U.S. 854, 107 S. Ct. 189, 93 L. Ed. 2d 122 (1986). Moreover, a bankruptcy court has broad discretion in deciding whether to approve a proposed settlement. In re Ira Haupt & Co. 252 F. Supp. 339 (S.D.N.Y. 1966); In re Sapphire S.S. Lines, Inc, 339 F. Supp. 119 (S.D.N.Y. 1972). The abuse of discretion standard recognizes that because of the bankruptcy judge's unique position to consider equities and reasonableness of a particular compromise, second-guessing by appellate courts will do little to improve upon the bankruptcy judges' decisions. In re American Reserve Corp, 841 F2d at 162.

The Court's authority to approve settlement agreements is set forth in Bankruptcy Rule 9019.

In acting on a motion for settlement, the Bankruptcy Court is afforded wide discretion. In re Sapphire S.S. Lines, Inc, 339 F. Supp. 119 (S.D.N.Y. 1972). In this case, the only objection to the settlement of the adversary proceeding was made by the Petitioners. The Petitioners now appeal the decision of the Sixth Circuit to affirm the settlement based on their contention that insufficient evidence was offered in support thereof. However, the record in this case contains more than sufficient documentation to support the fact that the Bankruptcy Court did not abuse its discretion in issuing the Settlement Approval Order. This is especially true when considering the Bankruptcy Court's special knowledge of the history of this adversary proceeding and the Chapter 11/Chapter 7 case at bar. While the Bankruptcy Court has an affirmative obligation to apprise itself of the underlying facts and make an independent decision as to whether the settlement was fair and equitable, there is no requirement to conduct a mini-trial as the Petitioners seem to contend. Both the District Court and the Sixth Circuit reviewed the record in this case and

determined that the Bankruptcy Court had met its burden of having made an informed decision and affirmed its decision.

B. The Reviewing Appellate Courts Correctly Held That The Bankruptcy Judge Had Access to and Considered The Relevant Factors In The Approval Process.

1. The Sixth Circuits Holding That The Bankruptcy Court Made An Informed Decision That The Settlement Was In The Best Interests Of The Estate Was Not In Conflict With Other Circuits And Was Consistent With This Court's Holding in TMT Trailer.

Contrary to the contention of Petitioners, the decision of the Sixth Circuit not only is not in conflict with other Circuits but is in perfect harmony with the other Circuits and this Court's decision in TMT Trailer, supra. Although Petitioners imply as much in their Brief, no Circuit requires that a bankruptcy court reviewing the propriety of a settlement be required to conduct a mini-trial. Matter of Walsh, 669 F2d 1325 (9th Cir. 1982); In re American Reserve Corporation, 841 F2d 159 (7th Cir. 1987).

> "A bankruptcy judge need not hold a mini-trial or write an extensive opinion every time he approves or disapproves a settlement. The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision. The judge may make either written or oral findings; form is not important, so long as the findings show the

reviewing court that the judge properly exercised his discretion." Id. at 163.

The Bankruptcy Court in this case fulfilled its affirmative obligation to apprise itself of the actions, facts and the legal theories in order to ascertain that the settlement was fair and equitable. The record made by the parties and the Bankruptcy Court at the July 10, 1992 settlement hearing make it clear that the judge was familiar with the underlying facts, the history of delay on the part of the Debtors, the fact that no creditor objected to the settlement, the additional expense that would be incurred and the legal theories of the parties. The requirement that the Bankruptcy Court make an independent, informed judgment that a proposed settlement is fair and equitable was met and as such, the Sixth Circuit's decision is not in conflict with the decision of any other Circuit nor this Court's decision in TMT Trailer.

The Petitioners cite American Reserve for support of their position that the Bankruptcy Court made an inadequate finding to support approval of the settlement. American Reserve is a factually different case than the case now before the Court. Objections were raised by major creditors and the judge in American Reserve failed to discuss the reasons for his findings. The American Reserve case is distinguishable from the case at bar in that here there are no creditors, major or minor, objecting to the settlement. This is a significant fact since it is one of the four elements that must be considered by the bankruptcy judge in whether to approve a settlement. Furthermore, the bankruptcy judge in the case at bar discussed the reasons for his findings on the record. The District Court in this case, after reviewing the record concluded that "[t]his bankruptcy court gave a sufficient explanation of its findings to show that it examined the various facts and made an informed and independent judgment." [A 37.]

Petitioners contend that there was insufficient facts and evidence presented to the Bankruptcy Court to allow the

Bankruptcy Court to make an informed decision regarding the likelihood that the Estate would prevail on the merits of the adversary proceeding. A review of the record in this case clearly discredits this allegation. As was noted by the Bankruptcy Court during its initial hearing on this matter held on July 10, 1992, "this case has a long history." [A 154.] The bankruptcy judge was well versed in the facts underlying the adversary hearing. [A 154 - 160.] Prior to the July 10, 1992 settlement hearing and subsequent rehearing, the Court had held numerous other hearings regarding the merits of this adversary proceeding, including an extensive hearing on two separate motions for summary judgment. The bankruptcy judge had also presided over a lengthy and detailed pretrial of the adversary proceeding. The bankruptcy judge also presided at a 2004 hearing where Petitioner Fishell was questioned at length by the attorney for the Trustee regarding the details of his adversary proceeding against Soltows.

The facts and legal arguments surrounding the underlying dispute over title to the Subject Property had been presented to the Court on many occasions throughout the Court's nearly two years of overseeing the case while it was in Chapter 11 and Chapter 7. Because of this long history of involvement with the case, the Court was especially well informed to judge the relative merits of the suit. Despite the Petitioners' current contentions to the contrary, this important fact was fully acknowledged and conceded by Petitioners' attorney at the time of the July 10, 1992 hearing on the settlement:

> "The court is well aware of the claims and the factual situations and the legal issues involved in the initial adversary suit by Mr. Fishell against the Soltows." [A 145]

In addition, the record reflects that the Chapter 7 Trustee made an informed decision to settle the Debtors' lawsuit. The Trustee and his attorney spent considerable time evaluating the

merits of the Debtors' claim as well as Soltows' counterclaim. The Chapter 7 Trustee and his counsel, both reviewed the extensive briefs and transcripts from hearings which had been previously submitted to the Court in the lawsuit, analyzed the law on point, and held an extensive 2004 examination of Petitioner Richard Fishell. [A 148 - 150] The Trustee then determined, as evidenced by the proposed settlement, that there was little possibility of ultimately succeeding on the merits. The Trustee further concluded that the potential of any recovery to the Estate was significantly outweighed by the benefits brought by an immediate settlement. The Trustee's "Motion to Approve Settlement" and the attached "Release and Settlement Agreement" provide both a summary of the background of the adversary proceeding and the significant factors on which the proposed settlement was based. The Trustee noted in this documentation that:

> "The Trustee and his counsel have expended substantial resources in investigating and evaluating the merits of both the claims and counterclaims raised in the adversary proceeding. Following such investigation and evaluation, the Trustee has determined that it is in the best interest of the estate and all of the creditors that the adversary proceeding be settled as set forth below. The Trustee bases his decision to enter into the proposed settlement upon factors which include, but are not limited to, the following:
>
> A. Avoiding the risk of litigation which includes the risk that a large damage claim could

potentially be asserted against the estate depending upon the outcome of the adversary proceeding.

B. Avoiding the delay inherent in the litigation process at both the trial and appellate levels.

C. Avoiding the cost to the estate of litigating the adversary proceeding which would involve numerous and complicated legal and factual issues." (Trustee's Motion to Approve Settlement, p 2. [A 165 - 166.])

As noted above, only the Petitioners raised an objection to the settlement. The Estate's many other creditors did not object to the settlement [A 160]. Soltows' counsel and the Petitioners' son and attorney, Roger Fishell, also submitted briefs regarding the proposed settlement. The bankruptcy judge stated that he had read the submitted material that had been presented to him in a timely manner. [A 145] Oral arguments were presented at the hearing and rehearing by attorneys for the Trustee, Soltows and Petitioners. The Petitioners' counsel submitted another memorandum of law the morning of the hearing contending that the settlement was not in the best interests of the Estate. Significantly, although the opportunity to present evidence was available, the Petitioners did not present any testimony at the settlement hearing in

opposition to the proposed settlement. (This would have been the perfect time to present a willing buyer to the Court to show that there would be a "surplus" as is now claimed by the Petitioners.) No testimony or for that matter any other evidence was presented by Petitioners when given the opportunity by the Court.

In their brief, the Petitioners spend considerable time arguing that the Trustee should not have proposed settlement of this adversary proceeding because the slander of title counterclaim set forth by Soltow had no merit. This is simply wrong.

Under Michigan law, a slander of title action exists both pursuant to statute and the common law. MCLA 600.2725 [A 226- 228] provides that if a plaintiff who files the lis pendens does not prosecute the action in good faith, the Court, in its discretion, may direct cancellation of the notice and direct plaintiff to pay any or all costs and expenses occasioned by filing the notice and the cancellation of the record, aside from the cost of the action itself. The common law elements of a cause of action for slander of title are: (1) falsity; (2) malice; and (3) special damages. Once the underlying claim was adjudicated in their favor, Soltow was prepared to offer proof to support his counterclaim under both statutory and common law. Falsity would be established by the ruling favorable to Soltows on the underlying claim of title. Malice would be established by the Fishells' knowingly filing an invalid lien on the property. Special damages would be shown by lost opportunity cost in development and the costs associated with clearing title to the property and the ongoing payment of real estate taxes. The costs incurred after the filing of the bankruptcy petition would have been a post-petition administrative expense given the highest order of priority for payment and would have substantially depleted or completely eliminated any payments to unsecured creditors. Michigan Courts have not addressed the issue of whether a notice of lis pendens is entitled to absolute immunity in certain

circumstances. Patten Corp v Canadian Lakes Dev Corp, 788 F. Supp. 975, 978 (W.D. Mich. 1991). On the other hand, both the Trustee and the Bankruptcy Court Judge who reviewed the claim and supporting information were of the opinion that the counterclaim in this case warranted concern, as it represented the potentially largest claim against the Estate.

The Court in Patten held that "defendant's allegation that it lost sales as a result of the notice of lis pendens sufficiently alleges `special' damages." Patten, supra at 979. Although Petitioners claim that a notice of lis pendens is not an actual lien on the property, the Patten Court noted that a notice of lis pendens is "similar to a lien on real property." Patten, supra at 978, n 4. The Patten Court went on to note:

> It is well settled in Michigan that the filing of a lien is not entitled to absolute immunity from a slander of title action. See Michigan Nat. Bank-Oakland v. Wheeling, 165 Mich App. 738, 745, 419 NW2d 746 (1988). Moreover, the Michigan legislature has evidenced an intent to make such notices actionable by specifically permitting a slander of title action arising out of the wrongful filing of notices under the Marketable Record Title Act. MCLA § 565.104. Id.

Thus, it is apparent from the above that the settlement of the adversary proceeding and the resulting withdrawal of the Soltows' counterclaim (the single largest claim against the estate) gave the estate substantial value and the avoidance of a potentially huge liability.

Moreover, as Soltows and the Trustee pointed out to the Bankruptcy Court, even if it were assumed that the counterclaim for slander of title were not sustainable, settlement of the adversary proceeding was still warranted due

to the complete lack of merit of Petitioners' underlying claim. Throughout the hearings both in the State Court and in the Bankruptcy Court, it became apparent that the underlying claims would eventually be decided on the basis of what witnesses the judge was able to believe. It was also abundantly clear to anyone who had reviewed the record that the Petitioners had lost all credibility with both the State Court Judge and the Bankruptcy Court Judge who oversaw this case. Assuming no further adjournment attempts by Petitioners, Bankruptcy Judge Nims would ultimately have decided the adversary proceeding.

Mr. Fishell's lack of credibility and trustworthiness was soon recognized by the Honorable David E. Nims, Jr. During the hearing and rehearing on the Motion by the United States Trustee for an Order Converting Fishells' Chapter 11 case to a Chapter 7 proceeding, the Bankruptcy Court made specific observations of the Petitioners' lack of credibility and trustworthiness in completing schedules and the unnoticed sale of an asset of the Estate. The Bankruptcy Judge stated that he didn't think he could trust Mr. Fishell anymore to comply with the law. [A 154]

Petitioners also argue that the disparity between the value of the property and the magnitude of the mortgage obligation due Soltows should have been considered by the Court. During the hearing, Debtors' counsel claimed that the value of the property was $1,300,000. However, no evidence of that fact was ever offered. Such a figure was pure speculation given the real estate market in 1992. The fact that Petitioners had been trying to market the parcel for over three years prior to escrowing the deed in lieu of foreclosure following default on the mortgage was undoubtedly a fact not lost on the Court. Indeed, one of the issues the Trustee thoroughly investigated during the 2004 examination presided over by Judge Nims was what the Subject Property was really worth.

The record is clear that the Bankruptcy Court considered fully the complexity of the litigation, expense and delay attendant with continuing with the litigation. [A 158-159]

The Court also considered the paramount interest of the creditors in approving the settlement. A Chapter 7 Trustee is charged with the fiduciary duty to administer the Chapter 7 estate expeditiously and in the best interests of the estate, In re Riverside-Linden Inv Co, 925 F2d 320, 322 (9th Cir. 1991). The policy favoring the efficient bankruptcy administration recognizes that the Chapter 7 trustee is the duly appointed representative of *all* unsecured creditors, rather than the representative of the Chapter 7 debtor or any individual creditor. As such, the trustee is an appropriate arbiter of the "best interests" of the Chapter 7 estate.

In summary, the Bankruptcy Court was well acquainted with the factual background and issues of law relevant to the adversary proceeding, which were extensively briefed and argued on numerous occasions, particularly in conjunction with earlier motions for summary judgment. There was more than sufficient evidence in the record of this case to support the settlement as proposed by the Trustee. The Bankruptcy Judge articulated the basis for his decision on the record which is detailed in the transcripts of the hearing held on July 10, 1992 as well as the hearing held on August 21, 1992. The Bankruptcy Court acted well within the bounds of his discretion when he granted the motion brought by the Chapter 7 Trustee

and issued his Order approving the settlement of the adversary hearing.

2. *The Questions for review are questions of the adequacy of the evidence and consequently do not reach the level of importance appropriate for review by this Court.*

Notwithstanding the Petitioners' arguments to the contrary, a review of the record of this case makes it abundantly clear that the instant case is fact specific. The outcome of whether the settlement of the adversary proceeding would or would not be approved revolved around the particular facts of the bankruptcy, its history and the specific facts of the adversary proceeding. Suffice it to say that the peculiar facts of the adversary proceeding will never again reoccur.

The issue before the court is neither novel nor particularly interesting. The issues are important only to the parties involved. The issues are not important legal problems within the realm of this Court's jurisdiction. This point is clearly evidenced by the fact that neither the District Court nor the Sixth Circuit elected to publish their decisions. The lack of jurisprudence importance is further evidenced by the Sixth Circuit's refusal to grant the Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc.

It has long been recognized that it is not the role of the United States Supreme Court to review lower court decisions which, as here, turn solely upon an analysis of particular facts involved, or upon the construction of particular contracts or written instruments. United States v Johnston, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925). The Court should be even less inclined to review cases like the one at bar where the findings of fact made by the Bankruptcy Court have

received the concurrence of both the District Court and the Court of Appeals.

CONCLUSION

Since there is no direct, real or intolerable conflict among Circuits, and since the Bankruptcy Court's decision, as affirmed by the Sixth Circuit, was based on the peculiar facts of the case and important only to the parties involved, there is no foundation for review. Certainly, the Sixth Circuit Opinion will not produce any anomalous future results since it was based on the peculiar facts of the case and, moreover, was correctly decided on its merits.

Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

Gary C. Rogers
FRASER TREBILCOCK DAVIS & FOSTER, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: 517/482-5800
Counsel for Respondents